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SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1928.

No. 479

HUGH W. GRANT, Receiver of the Struthers Furnace Company, Petitioner,

vs.

A. B. LEACH & COMPANY, INC.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SIXTH CIRCUIT AND BRIEF IN SUPPORT THEREOF.

J. P. WILSON,
Counsel for Petitioner.
A. M. HENDERSON,
Of Counsel for Petitioner.

(33,788)

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SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1928.

No. 479

HUGH W. GRANT, RECEIVER OF THE STRUTHERS FURNACE COMPANY, PETITIONER,

vs.

A. B. LEACH & COMPANY, INC.

PETITION FOR WRIT OF CERTIORARI.

MAY IT PLEASE THE COURT:

The petition of Hugh W. Grant, Receiver of The Struthers Furnace Company, respectfully shows to this Honorable Court:

A.

Summary Statement of the Matter Involved.

On May 15, 1922, A. B. Leach & Company, Inc., purchased an issue of 8 per cent first mortgage bonds of the face or par value of $1,500,000 of The Struthers

Furnace Company, of Struthers, Ohio, an Ohio corporation, at an agreed price of 90½ cents on the dollar and accrued interest, in part payment of which Leach & Company delivered, and the Furnace Company accepted 3,000 shares of the 7 per cent preferred stock of the Furnace Company at a fixed price of $85 per share of the par value of $100 each. It has been the claim of your petitioner at all times during this controversy that this exchange of preferred stock for first mortgage bonds was consummated under such circumstances as to constitute fraud and was in violation of the corporation laws of the State of Ohio, and the articles of incorporation of the Furnace Company.

In January of 1925, Hugh W. Grant, of Youngstown, Ohio, was appointed Receiver of the Furnace Company by the Common Pleas Court of Mahoning County, Ohio, and in August of 1925, as such Receiver, he brought suit in the District Court of the United States for the Northern District of Ohio, seeking to recover and require Leach & Company to return the bonds which it had received in this fraudulent and illegal exchange for the 3,000 shares of preferred stock, to wit, bonds of the face value of $255,000, plus interest paid upon them and asking the alternative relief of an accounting if the bonds had been sold or otherwise placed beyond the control of Leach & Company.

The bill of the Receiver Grant averred that he was (R., 2)

> "The duly appointed and qualified Receiver of all of the property, goods, assets, choses in action and of all other kind and character of property of The Struthers Furnace Company,

duly appointed by the Court of Common Pleas of Mahoning County in the case of The Guardian Savings & Trust Company, Trustee, Cleveland, Ohio, *versus* The Struthers Furnace Company, being case No. 56103 in the said Court, and that he was appointed and duly qualified on the 20th day of January, 1925."

In its answer respondent admitted these allegations of the bill as above quoted (R., 9 and R., 19).

Your petitioner further averred in his bill that the action was brought by the Receiver "by virtue of authority so to do granted to him by the court so appointing him as Receiver" (R., 2), and as to this averment the respondent *neither admitted nor denied the allegation, but required your petitioner to make strict proof thereof* (R., 9 and R., 19).

Two suits had been commenced in the Court of Common Pleas of Mahoning County, Ohio, on January 25, 1925, one by Louis S. Baldwin, a preferred stockholder, and the other by The Guardian Savings & Trust Company, trustee under the mortgage securing the bonds, a portion of which had been exchanged by the Furnace Company for the 3,000 shares of the preferred stock then owned by Leach & Company, in both of which suits the appointment of a receiver was asked. The two cases were consolidated by the State court and your petitioner was appointed by the court in both of them (R., 251 to 253). In the Baldwin case, various allegations of facts tending to show insolvency of the Furnace Company were made (R., 255-256), as well as an allegation to the effect that certain creditors of the Furnace Company had failed to make

an accounting to the company for its equity in certain personal property which had been pledged to those creditors and wrongfully disposed of by them (R., 256) and prayed for the appointment of a receiver to "take charge of the plant, property, and assets" of the Furnace Company, and for such other equitable relief as to which plaintiff may be entitled (R., 257). The other of these two suits was brought by The Guardian Savings & Trust Company, trustee, in foreclosure of the mortgage securing these bonds and seeking in aid thereof the appointment of a receiver, and other equitable relief.

Subsequent to the appointment of the Receiver, to wit, on July 30, 1925, the State court *did* issue to the Receiver in these consolidated cases an order of authority to sue Leach & Company for the recovery of equitable relief for the benefit of the creditors and stockholders of the Furnace Company on account of the above fraudulent and illegal exchange of the Furnace Company 8 per cent mortgage bonds for its 7 per cent preferred stock (R., 262 to 264). Upon this authority so granted by the State court, this action was so commenced in the said Federal Court of Ohio upon the ground that this exchange of bonds for preferred stock was contrary to law, fraudulent and in violation of the terms and provisions of the articles of incorporation of the Furnace Company; that the purchasers of the bonds who had paid cash to the Company therefor, and the preferred stockholders who had given their required written consent to the bond issue, upon the representation of the officers and directors of

the company that it would receive *cash* for *all* the bonds, were entitled, in the name of the Receiver, to an accounting, *i. e.*, either to a return of the bonds and interest for the 3,000 shares of preferred stock tendered back by the Receiver, or cash; that the exchange was a fraudulent preference among the preferred stockholders of the Furnace Company, the total outstanding preferred stock, held at the time by many owners, being 12,500 shares (R., 2 to 8).

There was very little dispute as to the facts in the case; the respondent herein answering upon the merits of the case by denying any fraud in the exchange and setting up estoppel of the Furnace Company and the Receiver, entirety of contract for the total issue of the bonds and that to compel the return of a part of the bonds would be making for it a new contract, and that the parties could not, in equity, be restored to their former position if the relief for which the Receiver prayed were granted.

The District Court entered a final decree for your petitioner, holding that the Receiver possessed "all the powers conferred by statute and general principles of equity on a Receiver" (R., 202), and rendering judgment against Leach & Company in the sum of $312,375, but granting to Leach & Company the equitable favor of being permitted to apply any part or all of the $255,000, face value of bonds, to the payment of this judgment (R., 213). The District Court held that under the corporation laws of the State of Ohio, as well as the general principles of equity, this exchange of mortgage bonds for preferred stock was unlawful and

beyond the powers of the Furnace Company and violated "numerous principles of corporation law and most of the principles of justice and honesty" (R., 210), as well as constituting a "gross form of fraud and unfair dealing" (R., 210).

The United States Circuit Court of Appeals for the Sixth Circuit, to which court the judgment of the District Court was appealed, reversed the judgment of the lower court and ordered the cause remanded to the District Court with a mandate to the lower court to dismiss your petitioner's bill, upon the ground that, while the State court had authority to appoint a receiver in the foreclosure suit of the trustee of the bonds against the Furnace Company, it did not have the power to direct him to take charge of any property not covered by the mortgage, and that, since there was no object or purpose in the suit of the preferred stockholder Baldwin against the Furnace Company that could be served by the bringing of the case at bar, "the State court was without authority to direct the Receiver to bring it" (R., 270-274).

The Appellate Court further held that it had no occasion to consider whether the order appointing the Receiver could be attacked in this case, the question being, *not whether the order was valid, but whether the Receiver had authority, as alleged, to bring this suit,* and that it was beyond the power of the State court to make the authorization for the Receiver to do so (R., 274 to 275).

A summary of these matters thus involved herein leads us to the following specifications, to wit:

First. On January 15, 1925, the trustee, designated under the mortgage deed of trust of the Furnace Company, brought suit in the State court praying for foreclosure of the mortgage deed, judgment for any deficiency, and the appointment of a receiver of all the company's property, segregation of the funds realized from this property, etc. (R., 248,249).

Second. On the same day, a preferred stockholder of the Furnace Company brought suit in the same State court alleging insolvency of the company, its failure to obtain an accounting from its creditors and debtors, and praying for the appointment of a receiver to take charge, possession, and control of all the property of the company, real and personal (R., 254 to 257).

Third. These cases were both filed in a State court having jurisdiction of the parties and the subject-matter.

Fourth. The two cases were consolidated by the State court and your petitioner was appointed as Receiver of all the property, both real and personal, of the Furnace Company in this consolidated action (R., 251 to 253).

Fifth. It is admitted by the pleadings in the case at bar that your petitioner was, at the time of the commencement of this action, the "duly appointed and qualified Receiver of all of the property, goods, assets, choses in action, and of all other kind and character of property of The Struthers Furnace Company, duly appointed by the Common Pleas Court of Ma-

honing County in the case of The Guardian Savings & Trust Company, trustee, Cleveland, Ohio, against The Struthers Furnace Company" (R., 9 and 19).

SIXTH. Upon application of the Receiver (R., 266) an order of the State court which had appointed your petitioner as such Receiver "of all of the property, goods, assets, choses in action, and of all other kind and character of property of The Struthers Furnace Company" was duly made to bring this suit in the Federal court for the benefit of the stockholders and creditors of the company (R., 264).

SEVENTH. By virtue of such authority, the Receiver sought to maintain this suit in the District Court for an accounting by Leach & Company, Inc., for the bonds which it had obtained unlawfully and fraudulently or for the purchase price thereof which it had agreed to pay but had not lawfully or equitably paid in fairness and justice to the preferred stockholders (other than Leach & Company, Inc.), and the purchasers of the bonds *for cash* (R., 2 to 8).

EIGHTH. Your petitioner recovered a judgment in said lower court finding that exchange of bonds of The Struthers Furnace Company for the preferred stock of said company was beyond the power of the corporation and its directors to accomplish and void, and that it constituted an unlawful transfer of the corporation assets and accomplished a fraud to the detriment of the bondholders, stockholders, and creditors of the corporation; and the defendant, Leach and Company, is liable and obligated in equity to account to the

plaintiff for the face value of the first mortgage gold bonds so unlawfully exchanged to the extent of the value placed upon said preferred stock in the exchange, that is two hundred fifty-five thousand ($255,000) dollars, with interest. Judgment was rendered for three hundred twelve thousand three hundred seventy-five ($312,375) dollars. The decree provided, however, that Leach and Company might surrender to the trustee for cancellation, any of the said mortgage bonds which it could control, in lieu of the payment of that much money on the judgment (R., 214 to 216).

NINTH. The United States Circuit Court of Appeals for the Sixth Circuit, by a divided court (Judge Hickenlooper, D. J., dissenting) held, that under these circumstances the Receiver did not have authority to maintain this action, reversed the judgment of the District Court upon this ground alone (R., 270 to 275), and remanded the case to the lower court with a mandate directing that court to dismiss your petitioner's bill (R., 270).

B.

Reasons Relied On for the Allowance of Writ.

In rendering the above decision, the United States Circuit Court of Appeals for the Sixth Circuit has:

FIRST. So far departed from the accepted and usual course of judicial proceedings as to call for an exercise of this Court's power of supervision;

SECOND. Decided an important question of local law in a way in conflict with applicable local decisions;

THIRD. Decided an important question of general law in a way untenable or in conflict with the weight of authority;

FOURTH. Rendered a decision in conflict with the decisions of other United States circuit courts of appeals on the same matter.

WHEREFORE your petitioner respectfully prays that a writ of certiorari be issued out of an under the seal of this Honorable Court, directed to the United States Circuit Court of Appeals for the Sixth Circuit, commanding that court to certify and to send to this Court for its review and determination, on a day certain to be therein named, a full and complete transcript of the record and all proceedings in the case numbered and entitled on its docket as No. 1606, Equity, A. B. Leach & Company, Inc., appellant, *versus* Hugh W. Grant, Receiver of The Struthers Furnace Company, appellee, and that the said decree and judgment of the said United States Circuit Court of Appeals for the Sixth Circuit may be reversed by this Honorable Court, and that your petitioner may have such other and further relief in the premises as to this Honorable Court may seem meet and just; and your petitioner will ever pray.

HUGH W. GRANT,
Receiver of the Struthers Furnace Company,
By J. P. WILSON,
Counsel for Petitioner, and
A. M. HENDERSON,
Of Counsel for Petitioner.

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1928.

No. 479

HUGH W. GRANT, RECEIVER OF THE STRUTHERS FURNACE COMPANY, PETITIONER,

vs.

A. B. LEACH & COMPANY, INC.

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI.

I.

The Opinions of the Courts Below.

The opinion in the United States District Court for the Northern District of Ohio (Eastern Division) was rendered on the 3d day of March, 1926, by the Hon. D. C. Westenhaver, district judge, and is found (R., 202-213).

The opinion in the United States Circuit Court of Appeals for the Sixth Circuit was filed on the 11th

day of July, 1928, and is found (R., 270-275); reported in vol. 27 (2d)—No. 2, Fed. Rep., adv. sheets, Sept. 13, '28, 201.

II.

Jurisdiction.

1. The date of the judgment to be reversed is June 30, 1928 (R., 270).

2. The claims advanced by petitioner herein were that the petitioner, as Receiver of The Struthers Furnace Company, has a right to maintain this action by virtue of his appointment as such Receiver by the Court of Common Pleas of Mahoning County, Ohio (R., 251-253 and 259-261), and also by virtue of the order of the said State court to bring the suit (R., 264-265). The appointment of the Receiver and the order of authority to bring this suit were made by the State court in two causes then pending in the State court, one for foreclosure of a mortgage deed of trust (R., 237-249) and one brought by a preferred stockholder, against The Struthers Furnace Company, the latter suit praying for equitable relief, and petitions in both cases praying for the appointment of a receiver.

The United States Circuit Court of Appeals for the Sixth Circuit, held that the Receiver did not have authority to commence and maintain the action at bar and that it was beyond the power of the State court to make the authorization to bring this acion (R., 270-275).

3. The statutory provisions under which the jurisdiction of the Supreme Court of the United States is invoked in this case is Judicial Code, Sec. 240 (*a*), as amended by the Act of February 13, 1925, 43 Stats., 938, and the reasons for granting petition for writ of certiorari are provided in Rule 35, Sec. 5 of this Court.

4. The case of

P. & R. C. & I. v. Gilbert, 245 U. S., 162; 62 Law. Ed., 221,

is to the effect that it is within the sound discretion of this Court to grant this petition for a writ of certiorari.

III.

Statement of the Case.

A full statement of the case has been given under heading "A" in the petition, and, therefore, in the interest of brevity, such statement is not to be repeated at this point.

IV.

Specification of Errors.

1. The United States Circuit Court of Appeals for the Sixth Circuit erred in finding and holding that petitioner herein did not have authority to commence and maintain this action in the United States District Court for the Northern District of Ohio against respondent.

2. The United States Circuit Court of Appeals for the Sixth Circuit erred in finding and holding that it was beyond the power of the Common Pleas Court of Mahoning County to make the authorization upon which petitioner, as Receiver of The Struthers Furnace Company, commenced and is now seeking to maintain this suit.

V.

ARGUMENT.

Summary of the Argument.

POINT A. The United States Circuit Court of Appeals for the Sixth Circuit, so far departed from the accepted and usual course of judicial proceedings as to call for an exercise of this Court's power of supervision, in that—

First, it held that the State court appointing the Receiver did not have authority to authorize the bringing of this suit, and,

Second, it held that the authority of the State court to authorize the Receiver to sue Leach & Company could be questioned and attacked in this case.

POINT B. The United States Circuit Court of Appeals for the Sixth Circuit decided an important question of local law in a way in conflict with the applicable local decision, in that—

First, it held that the State court appointing the Receiver did not have authority to authorize the bringing of this suit, and,

Second, it held that the authority of the State court to authorize the Receiver to sue Leach & Company could be questioned and attacked in this case.

POINT C. The United States Circuit Court of Appeals for the Sixth Circuit decided an important question of general law in a way untenable or in conflict with the weight of authority.

POINT D. The United States Circuit Court of Appeals for the Sixth Circuit rendered a decision in conflict with the decision of other United States circuit courts of appeals on the same matter, in that—

First, it held that the State court appointing the Receiver did not have authority to authorize the bringing of this suit and,

Second, it held that the authority of the State court to sue Leach & Company could be questioned and attacked in this case.

POINT A.

The United States Circuit Court of Appeals for the Sixth Circuit, so far departed from the accepted and usual course of judicial proceedings as to call for an exercise of this Court's power of supervision in that—First, it held that the State court appointing the Receiver did not have authority to authorize the bringing of this suit.

We are departing from the order by which Rule 35, Section 5 of this Court points out the reasons upon

which the court may, in its discretion, grant your petitioner's prayer for a writ of certiorari so as to urge the above reason as the first, rather than the last, of those suggested by the rule.

We do this with the idea in mind that under this point heading a more general and comprehensive argument may be made upon the reasons set forth herein for the granting of this petition, and in a more logical sequence, than under any other point heading made in this brief.

The original foreclosure proceeding was brought by the trustee of the bondholders, as much the trustee for Leach & Company as of any other bondholders. The mortgage itself provided that a receiver might be appointed upon prayer of the trustee (R., 246) for the purpose of conserving the rights of all of the bondholders, and the trustee having invoked the powers of a court of equity to conserve its rights and properly distribute the proceeds of the mortgaged property, to say the least, it would seem grossly insufficient and anomalous, not to say ridiculous, for Leach & Company, standing in the shoes of a bondholder whose money it had received for the sale of the bonds, to come into court now and question the authority of the Receiver to preserve the assets of all other bondholders and to inquire into the validity of some of the bonds.

In addition to this, it must be borne in mind that the above foreclosure suit was consolidated with the suit of Louis S. Baldwin against the Furnace Company (R., 259), the petition in which latter suit (R., 254), as we have stated in our statement of matters

involved in the petition, clearly set up an insolvent condition of the Furnace Company, a failure of the officers and directors to protect the company from its creditors and the prayer for the appointment of a receiver to take charge of all the assets of the company, with the fair inference from the petition as a whole that it was sought to carry the affairs of the company in the hands of a receiver either to the point of a liquidation and dissolution or recapitalization. We believe that the allegations of the petition in the Baldwin suit were sufficient to warrant the State court, in the exercise of its discretion, to appoint a receiver for all of the property of the company; certainly, however, when the Baldwin case was consolidated with the trustee's foreclosure suit against the Furnace Company and when both petitions prayed for the same relief upon different allegations of fact upon which to base the granting of such relief, to wit, the appointment of a receiver, the court was fully justified under the laws of the State of Ohio, in appointing a receiver over all the property of the Furnace Company in answer to the prayers in both of these suits.

State of the Pleadings.

An examination of the petitions filed by the trustee in the foreclosure suit shows that in the prayer of the petition judgment for the entire amount due on the outstanding bonds was asked and that a sale of the mortgaged property be had (R., 248).

The prayer for a deficiency judgment in the event that the proceeds of the sale were not sufficient to liquidate the bonds was also made. Then the further prayer for the appointment of a receiver to take charge of the property and

> "that the court order the defendant *or any receiver appointed to take charge of the defendant's property* to hold, set apart and sequester any amounts received arising in any way from the *mortgaged* property" (R., 249).

In other words, the whole intent and purpose of this prayer is that a receiver be appointed to take charge of all the property of the Furnace Company; that any deficiency be declared a valid claim against the Furnace Company, and that the Receiver appointed to take charge of the defendant's property sequester and set apart any and all amounts received from the *mortgaged* property.

In other words, A. B. Leach & Company's own trustee prayed that the Receiver be vested with just exactly the extent of authority as that with which he was actually vested by the court in this case, and we believe that respondent should be precluded from challenging the act of its agent trustee.

Leach & Company, however, precluded itself from raising any question as to the validity of the State court's order by its answer filed in the instant case. The first paragraph of the Receiver's petition (R., 2) reads as follows:

> "Now comes the plaintiff, Hugh W. Grant, and avers that he is the *duly* appointed and qualified Receiver of *all of the property, goods, assets, choses in action and of all other kind and character of property of* The Struthers Furnace Company duly appointed by the Common Pleas Court of Mahoning County in the case of The Guardian Savings & Trust Company, Trustee, Cleveland, Ohio, *versus* Struthers Furnace Company, being case number 56103 in the said court and that he was appointed and *duly* qualified on the 20th day of January, 1925, and that he is a citizen and resident of the State of Ohio."

The answer and the amended answer of Leach & Company, found respectively on pages nine and nineteen of the record, say:

> "This defendant admits the allegations in the first paragraph of said petition contained."

Equity Rule Thirty provides:

> "Averments other than of value or amount of damage, if not denied, shall be deemed confessed."

Here we have a distinct admission of all the averments in the first paragraph of the petition. Thus the truth of these allegations is effectively and absolutely established.

What is the effect of the allegations of this first paragraph quoted *supra?* The averment is that the Receiver is the *duly* appointed and qualified Receiver of *all of the property, goods, assets, choses in action and*

of all other kind and character of property of the Furnace Company *duly* appointed by the Common Pleas Court of Mahoning County.

This admission is far reaching. Black's Law Dictionery defines the word "duly" as follows:

> "In due or proper form or manner; according to regular requirements; regularly; upon a proper foundation, as distinguished from mere form."

It then cites

Robertson v. Perkins, 129 U. S., 233.

In that case the court says:

> "The allegation of the complaint in this case is, that the plaintiff *duly made and filed protest in writing, and duly appealed to the Secretary of the Treasury.* • • • As none of these allegations were denied in the manner required by Section 500 of the Code, they were, by Section 522, to be taken as true; and no issue was joined upon any one of them."

quoting further

> "But the court held that the allegation that a corporation was 'duly organized under the laws of this State,' pursuant to the agreement, imported that the requisite number of persons united for that purpose; that it must be assumed that the corporation was regularly organized; and that it was unnecessary for the plaintiff to show in his complaint the precise steps taken to accomplish that result. The word *'duly'* means, in a proper way, or regularly, or *according to law.*"

Thus, under the authority of this Supreme Court decision, the effect of Leach & Company's admission of the averments of the first paragraph of the Receiver's petition was to admit that Grant was, according to legal requirements, and in due and proper form, appointed Receiver of *all* of the property of every kind and nature, including choses in action of the Furnace Company. This interpretation is also in exact conformity with the requirements of Equity Rule Thirty so that there could be no issue for the Circuit Court of Appeals to determine as to the regularity of either the appointment of Grant as Receiver or as to the court's right to vest in the Receiver the *entire* property and assets of every kind and nature belonging to the Furnace Company.

All of the second paragraph of the Receiver's petition was admitted except the allegation—

> "This action is brought by said Receiver by virtue of authority so to do granted to him by the Court of his appointment."

Now inasmuch as under the holding of *Robertson v. Perkins,* cited *supra,* and under the provision of Equity Rule Thirty it was not necessary for the Receiver to introduce any evidence as to his being duly appointed and qualified as Receiver of all the assets, at best, the only thing that could be required of the Receiver would be to introduce in evidence a certified copy of the journal entry of the State court appointing him (R., 264), authorizing him to bring this suit, *because all the legal requirements necessary to empower the court to*

give him this authority are admitted by the defendant when they specifically admit the allegations of the first paragraph.

The sole issue under the pleadings, therefore, was whether the court, who had admittedly and properly appointed the Receiver with custody of all the assets, *had actually granted* the authority to bring the suit. The introduction of the journal entry on this matter (R., 264) leaves the evidence uncontradicted that the court actually gave this authority, so there is no issue on that point.

But there could be no issue as to this question of whether or not the court actually gave this authority because the answer and the amended answer of Leach & Company state (R., 9 and 19) that the defendant

> "neither admits nor denies said allegations of the petition."

Such an answer does not conform with the requirements of Equity Rule Thirty so as to be construed as a denial of the allegation of authority, but is, we believe, equivalent to no answer at all and, therefore, amounts to an admission of this point also.

Even if it were to be conceded that the Circuit Court of Appeals had jurisdiction to pass on an issue as to whether or not the State court had authority to appoint the Receiver and as to whether or not the court authorized the Receiver to bring this suit (and we contend the Circuit Court did not have such jurisdiction), still, as we have shown, there was no issue for the court to determine as to either of these two matters.

The Authority of the Receiver Aside from the State of the Pleadings.

Aside from the state of the pleadings, however, we insist that the bringing of this case in the District Court was validly and properly authorized by the State Court under the laws of the State of Ohio and as a matter of law and of fact. Section 11894 of the General Code of Ohio, quoted below) enumerates the grounds upon which a receiver may be legally appointed in Ohio:

> "Sec. 11894. Appointment of Receiver.—A receiver may be appointed by the supreme court or a judge thereof, the court of appeals, or a judge thereof in his district, the common pleas court or a judge thereof in his district, or the probate court, in causes pending in such courts respectively, in the following cases:
>
> "1. In an action by a vendor to vacate a fraudulent purchase of property, or by a creditor to subject property or a fund to his claim, or between partners or others jointly owning or interested in any property or fund, on the application of the plaintiff, or of a party whose right to or interest in the property or fund, or the proceeds thereof, is probable, and when it is shown that the property or fund is in danger of being lost, removed or materially injured;
>
> "2. In an action by a mortgagee, for the foreclosure of his mortgage and sale of the mortgaged property, when it appears that the mortgaged property is in danger of being lost, removed or materially injured, or that the condi-

tion of the mortgage has not been performed, and the property is probably insufficient to discharge the mortgage debt;

"3. After judgment, to carry the judgment into effect;

"4. After judgment, to dispose of the property according to the judgment, or to preserve it during the pendency of an appeal, or when an execution has been returned unsatisfied and the judgment debtor refuses to apply the property in satisfaction of the judgment;

"5. In the cases provided in this title, and by special statutes when a corporation has been dissolved, or is insolvent, or in imminent danger of insolvency, or has forfeited its corporate rights;

"6. In all other cases in which receivers heretofore have been appointed by the usages of equity."

Section 11897 (O. L. 51; V57) of the General Code of Ohio provides as follows:

"Powers of Receiver.—Under the control of the court, the receiver may bring and defend actions in his own name, as receiver, take and keep possession of the property, receive rents, collect, compound for, and compromise demands, make transfers, and generally do such acts respecting the property as the court authorizes."

We confidently urge that the granting by the State court to the Receiver of the right to bring the suit at bar, *even though the order had been made in the foreclosure suit alone,* comes clearly within the provisions

of the above section of the Code of the State of Ohio. This section provides that "under the control of the court, the Receiver may bring and defend actions in his own name, as Receiver, * * * and generally do such acts *respecting the property* as the court authorizes." The commencement and maintenance of the petitioner's case against Leach & Company has been clearly one "respecting the property," with the possession of which, it is conceded in this case, the Receiver had been properly vested.

A receiver appointed under the laws of the State of Ohio has established to him by statutory provision, a legal right, and the effect of his appointment over the mortgaged property and his seizure of it, is to fasten the claims of creditors upon it and to give the receiver control over the property for the benefit of creditors. We contend, therefore, that the Receiver in this instance was required in the performance of his duty to protect the creditors of the company, as well as the stockholders thereof, against any fraudulent or invalid claim which might be made by way of lien or otherwise against the property of which he was so possessed. In the instant case, a lien on the property was being asserted, a very substantial part of which he had reason to believe was fraudulent and invalid. To protect the stockholders and these creditors whose claims had been so fastened upon the property itself, he brought this suit under the express order of the State Court (R., 264).

We cite to the court in this connection the case of *Cheney v. The Maumee Cycle Co.*, 64 O. S., 205,

a quotation from the opinion in which case to which we desire to particularly call this Court's attention being found on page 214 of the report and reading as follows:

> "By express provision of Sec. 5590 (now 11897 General Code), Revised Statutes, the receiver is given power, under the control of the court, to take and keep possession of the property, and generally to do such acts respecting the property as the court may authorize. This statutory provision establishes a legal right, and this legal right is not affected by the fact that it is conferred in an action in its nature equitable, nor by the fact that it is to be enforced against a claim which would have been good as between the claimant and the debtor. It follows from this that the effect of the appointment, and the seizure of the property by the receiver, was to fasten the claims of creditors upon it and to give that officer control over it for the benefit of creditors, and in this respect his relation to it was, for all practical purposes, the same as that which an assignee would have had. The property thus sequestered was held by the receiver as effectually as an assignee could have held it, or as creditors could have held it by attachment or levy. *In no other way than through him could the rights of creditors be worked out, and, in this aspect of the case, he represented the creditors rather than the debtor.*"

The Circuit Court of Appeals for the Sixth Circuit, however, in its opinion (R., 273), states:

> "Until some showing was made in the pleading or some relief asked touching upon the validity of the transaction with Leach & Company, the Court had no authority, we think, to inquire into that matter. This, of course, does not mean that those who suffered from fraud, if there was fraud, perpetrated upon the company in the issue and sale of the bonds, would be without remedy, as, in that case, any injured precedent creditor or preferred stockholder could maintain an action for restitution."

We cannot see the logic of this statement in view of the interpretation of the Ohio laws upon matters of receivership as put upon them by the Supreme Court of Ohio in the case of

Cheney v. Maumee Cycle Co., supra.

As above quoted, in connection with the holding of the lower court, that the Receiver in the instant case did not have authority to bring this action on behalf of the company's creditors (including the bondholders) and preferred stockholders, the Supreme Court of Ohio held that in cases of this kind the Receiver represented creditors rather than the debtors (in this case The Struthers Furnace Company), and, as we shall hereafter point out and as particularly held in the case of

Porter v. Sabin, 149 U. S., 473, 474; 37 Law Ed., 815,

the right of a creditor or stockholder to bring a suit of this kind is only available when the receiver of the

property concerning which the suit is brought or concerning any liens upon the property, has failed to bring such suit.

To say the least, it seems more than merely technical for the lower court to have reversed this case solely upon the theory that the Receiver could not have had authority to bring the suit on behalf of those whom he represented under the laws of the State of Ohio and whom the court below stated would have the right to bring such an action to recover upon a fraudulent transaction such as the one found by the District Court in the case at bar.

To the effect that a receiver in Ohio has the same powers with reference to the receivership property as though he were vested with actual title to all such property, real or personal, of the corporation of which he is so appointed, is the holding in the case of

> *W. D. Sayle, Rec'r, v. The Guarantee S. & L. Co.*, 2 O. C. C. R. (N. S.), 401, and affirmed by the Supreme Court of Ohio in 72 O. S., 639.

In

> *Smith on Receiverships*, Sec. 72,

this language is adopted:

> "Where a court of chancery in the order of appointment confers power on the receiver to sue, he may do so on the principle that the receiver is, by operation of law, subrogated to all the rights of the real party in interest."

Also in

34 Cyc., 248,

is found the following text:

> "*Exercise of Supervision.*—The court may enlarge or vary its receiver's duties according as the facts may demand, and by supplementary order authorize him to do such things as may be necessary to accomplish the purposes of the receivership and for which no special authority is conferred by the order of appointment, upon its own motion, or upon the application of the receiver or interested parties."

The above text writer citing to support this text the case of

Sanger v. Upton, 91 U. S., 56 (23 Law Ed., 220).

The case of *Sanger v. Upton, Assignee, supra,* was cited with approval in the case of

Barbour v. National Exchange Bank, 45 O. S., 133.

So far as the powers of a receiver *with reference to the property of which he is vested as such officer,* are concerned, he has all the power and authority, under orders of the court appointing him, to do all things which an assignee might do or any other liquidating officer of an insolvent and dissolved corporation might do, for clearly the grounds upon which a receiver may be appointed under the laws of the State of Ohio, or the limitations thereof, have nothing whatever to do with the powers and authority of the receiver after his appointment. It is just as apparent that the pow-

ers of a receiver "respecting the property" (Ohio G. C. 11897) of which he is appointed receiver are just as broad as though he were vested with possession and control of the property as receiver in a dissolution proceedings and of an insolvent corporation or as assignee of the corporation by voluntary assignment. It would seem that the mere statement of this contention would be sufficient to sustain its truth. However, the courts of Ohio have uniformly held this proposition to be the law of the State for, as stated in

W. D. Sayle, Recr., v. The Guarantee S. & L. Co., supra,

> "A receiver of an insolvent corporation may commence and maintain a suit to set aside a fraudulent transfer of securities and recovery of possession thereof * * * all the authority in that behalf accorded to a receiver of a dissolved corporation is possession by a receiver of an insolvent corporation."

and in the case of

Cornell et al. v. Sulter, 13 O. C. D., 384,

the Circuit Court of Ohio held that

> "The assignee in insolvency proceedings is the proper party to prosecute an action to set aside a fraudulent transfer of property, or to have determined the rights of persons claiming liens on any of the assigned property by pledge or otherwise, and the priority thereof."

The situation presented by the case at bar is not the same as that presented by the facts in the case of

Scott v. Farmers Loan & Trust Co., 69 Fed., 17, cited by the lower court to uphold its decision that the State court in the instant case did not have the power to direct the Receiver to bring this suit. In the Scott case, the decision of the United States Circuit Court of Appeals for the Eighth Circuit was to the effect that a court of equity has no power upon a bill for the foreclosure of a railroad mortgage, to take into its custody or control, through a receiver or otherwise, property not covered by the mortgage, nor to make any order that will hinder or delay creditors in subjecting property not covered by the mortgage to the payment of their debts. The distinction between that case and the instant case is apparent. In the case at bar, the suit against Leach & Company, as we have heretofore stated, was with respect to the mortgaged property which concededly was properly vested in Grant, as receiver of the Furnace Company. On the other hand, in the Scott case, *supra*, the claim of Scott, intervener, was upon a judgment lien on the lands of the Railroad Company described in the petition and that the lien of the mortgages which the Trust Company sought to foreclose did not extend to or embrace such lands.

We believe that this Court, in the case of

> *Porter et al. v. Sabin*, 149 U. S., 473-474 (37 Law. Ed., 815),

has stated the rule applicable to the instant case in the syllabi of the case, as follows:

> "3. The receiver of an insolvent corporation is the proper party to bring a suit to enforce its rights of property; and if he does not sue, he

should be made defendant in a suit by stockholders in the right of the corporation.

"4. The court which appoints a receiver of the property of a corporation itself holds and administers the estate through the receiver as its officer and must decide whether it will determine for itself all claims of or against the receiver, or allow them to be litigated elsewhere."

Certainly the language of this Court in the last cited case as quoted above, to the effect that the court appointing a receiver must decide whether it will determine for itself all claims of or against the receiver or allow them to be litigated elsewhere, has reference to claims of or against the receiver pertaining to the property of which the receiver has control and possession (in this case the mortgaged property), the amount of money due upon which mortgage was questioned by Grant as Receiver in the case at bar and, under the direction of the Court of the Receiver's appointment, he could properly raise this question elsewhere than in the court of the Receiver's appointment.

Unquestionably, Grant, as Receiver in this case, could have intervened in the foreclosure suit on behalf of creditors whose interest in the mortgaged property in Ohio was fastened to the property itself.

(*Cheney v. Maumee Cycle Co., supra*),

upon his appointment as Receiver thereof, and had the State court in that case determine with jurisdictional authority so to do, as to the validity of all, or any part of the bonds, to recover the amount due upon which the Trustee had brought the foreclosure suit.

It seems just as clear, also, particularly under the holding of this Court in

Porter et al. v. Sabin, supra,

that the State court had the right and authority in matters so definitely a part of those involved in the foreclosure suit, to "allow them to be litigated elsewhere."

To put the matter concretely, if we were to assume, for the sake of argument, that the appointment of the Receiver by the Ohio court gave him no authority save to take possession of, and conserve and preserve the identical property covered by the mortgage and the fund to be realized therefrom, and to administer it for the benefit of legal bondholders, and the surplus, if any, for the benefit of creditors and stockholders, then, even in that situation, we think it could not be denied that it was not only the duty of the receiver, but also in the power of the court to order the Receiver, in order to conserve the mortgaged property, to defend against the foreclosure of any bonds illegally issued by the corporation in exchange for its own preferred stock contrary to the law of Ohio, and to thus convert a preferred stockholder into a preferred bond and mortgage lien holder, and to make in that case the same averments that were made in this instant affirmative case. Then, if it transpired that Leach & Company had sold these bonds, as appears by the records, to *bona fide* purchasers without knowledge of the fraud, it would have been the duty of the Receiver, and clearly within the power of the court in aid

of his conservation of the identical property mortgaged, to cross-petition against Leach & Company making them parties in that action, serving that company, a New York corporation, at its Cleveland office, and praying for the surrender of the bonds or in lieu thereof an accounting in equity for the amount of the purchase price of the bonds at the time of the illegal exchange by Leach & Company. In that event, the case could have been removed to the United States District Court and we would have had pending in that court, where this original case was commenced, the identical questions on the merits of the case that were litigated in the trial in that court, and we think no one would contend that the court had not ample authority and jurisdiction to order the Receiver to do these things, in order that the amount received at the foreclosure sale for the property should be augmented by the amount of recovery against Leach & Company in the event that Leach & Company was not in a position to surrender its bonds. Such action by cross-petition clearly would have been within the authority of the court to order, so that in the event these illegal bonds in the hands of innocent purchasers were protected in the distribution of the proceeds of the sale of the mortgaged property, that the funds should be to that extent replenished out of the pockets of the wrongdoer.

Now, in order to accomplish this, the court ordered the Receiver to conserve the property in that manner by conserving the proceeds of the property. It was the duty of the Receiver on behalf of the remaining bondholders at whose instance, through the Trustee, this Receiver was appointed and on behalf of the cred-

itors, to conserve, by any appropriate equitable action the fund realized from the sale of the property, so that in the event of a shrinkage in the sum realized to bondholders in a sale of the property, which let us add actually resulted, the fund available for this distribution would be increased to the exact amount necessary to take care of those holding bonds unlawfully issued and credited with the exact amount of money which Leach & Company should have paid in cash to the company upon the original exchange of the bonds for preferred stock.

The court then having authority to so direct the Receiver in the original action to accomplish that result, being strictly within the duty of the court and Receiver, in aid of the conservation of the corporation's mortgaged assets, how can any question be raised as to the authority of the court to direct this instant effectual action to be commenced in the Federal Court of the Northern District of Ohio, thereby accomplishing the identical relief which could have been accomplished under an order of the court to file a cross-petition against Leach & Company in the original action? If the court is empowered to conserve the mortgaged assets by appropriate action through the Receiver, how can there be any lack of power to conserve the proceeds of the property by augmenting the fund to the extent that it had been depleted by distribution in behalf of bonds illegally issued?

The learned judge, who wrote the opinion of the majority of the members of the Circuit Court of Appeals (R., 273), seems to proceed upon the theory that unless the trustee in the foreclosure suit questions the

validity of some of the bonds that a receiver, whose duty it was to safeguard the interests of all of the valid bondholders as well as the creditors and stockholders, cannot under order of the court attack the validity of any of these bonds. If such were the law, it would place the corporation in a sorry and helpless plight, as the Receiver could not under order of court raise those questions if the Trustee failed to do so. What remedy would either the other bondholders, creditors or stockholders have inasmuch as the Receiver had been appointed and he had full control of the mortgaged corporate assets, and whose duty it was to conserve the fund ultimately to be received from the sale of the property? No obligation was owing by the Trustee under the mortgage to the Furnace Company's general creditors, but the State Court and the Receiver owed the obligation to the company's general creditors and stockholders, as well as the *bona fide* bondholders, all of whose interest had become fastened to the mortgaged property, of seeing that their interests were protected, as held in

Cheney v. Maumee Cycle Co., supra, and
Sayle, Recr. v. The Guarantee S. & L. Co., supra.

The court below, however, stated in its opinion (R., 273 & 274).

> "This, of course, does not mean that those who suffered from fraud, if there was fraud, perpetrated upon the company in the issue and sale of the bonds, would be without remedy as, in that case, any injured precedent creditor or preferred stockholder could maintain an action for restitution. Whether such creditor or stock-

> holder would be permitted to intervene for that purpose in the foreclosure suit, and assert so hostile a claim to the objects of that suit, may well be doubted."

and further stated (R., 272):

> "We do not doubt the authority of the court to appoint a receiver in that case, but we do think that it would not have the power to direct him to take charge of any property not covered by the mortgage."

However, the question of the validity of each and every one of the outstanding bonds upon which the trustee had brought his action in foreclosure was clearly a matter pertaining to the property covered by the mortgage, and, while the lower court also, in its opinion in the first sentence of Record, p. 272, stated

> "that the powers of a receiver are limited by the purposes of the suit in which he was appointed,"

we can think of no question concerned in the purposes of a foreclosure suit more than the amount of money due upon the lien sought to be foreclosed.

In:

> *Mississippi Valley Trust Co. v. Railway Steel Springs Co. et al.*, 258 Fed., 346 (C. C. A., 8th Cir.), (Syl. 7).
>
> "A court, administering property already in its hands through a receivership, may properly draw to itself, all disputes as to liens and other rights upon or pertaining to such property."

Nor does Sec. 11897 Ohio General Code (*supra*), provide any such limitation to the powers of a receiver as

the lower court would impose in limiting those powers to "the purposes of the suit in which he was appointed" (R., 272); that section provides not only for the right of the Receiver to sue, etc., but

> "generally do such acts respecting the property *as the court authorizes.*"

Clearly, it could make not a particle of difference as to the right of the State court to grant authority to Grant, as Receiver, whether the authority was to contest the validity of the bonds in the hands of Leach & Company or require an accounting for the sale price of the bonds by Leach & Company in the event the latter had sold them to those who thereby became *bona-fide* holders for value; the interest of the bondholders, themselves, as well as the unsecured creditors of the Furnace Company, could only have been protected by the Receiver in one or the other of these two forms of actions, both of which, in the alternative, were sought to be maintained by him, and alternative relief, in conformity therewith, was granted by the District Court (R., 215).

As stated by the District Court (Hon. D. C. Westenhaver, D. J.) (R., 211),

> "Every bondholder had then and has now an interest in bringing about this result. The security back of his bond, as well as the future success of the corporation, gives him a right to compel this result."

The foreclosure suit, itself, was brought in the interest of these bondholders.

But, in addition to the authority which the State court might properly have granted to the Receiver in the foreclosure suit, is that which he might so properly grant in the Baldwin suit. The facts alleged by the preferred stockholder, Baldwin, in that suit (R., 254, 5, 6, & 7) are such as to clearly allege facts establishing an insolvent condition of the Furnace Company; certainly the facts alleged in that petition are such as from them the insolvent condition of the company might be naturally and reasonably deduced.

Cincinnati Equipment Co. v. Degnan (C. C. A., 6th Cir.), 184 Fed., 834.

Terry v. Tubman, 92 U. S., 156-170.

Mitchell v. Gazzam, 12 Ohio, 315 & 336.

Nor do we believe that it will be seriously denied here that where two cases are properly consolidated, as in the instant case, in which cases the prayers for remedial relief are identical, that all of the averments in each one of the petitions invoking the aid of the court to interpose with relief, in this case by receivership, must be taken together,—the one supplementing the other, as if all of the averments pertinent to the relief sought had been set out out in one petition. This being a case asking the foreclosure of a mortgage, supplemented by averments pleading beyond question the insolvency of the mortgagor and the shrinkage of its assets and the fact that under prevailing conditions the plant, property and assets could not be sold except at a great loss, and the utter inability of the corporation to pay even the interest on its mortgage or redeem the pledge of any of its quick assets or to pay anything

to its general creditors or to require an accounting by those creditors who had wrongfully appropriated its collateral security makes a very strong case, both under the statutes and under the equitable jurisdiction of the court for the appointment of this Receiver as ancillary to the prayer for foreclosure of the mortgaged property, and looking to the dissolution of the corporation. The object of the appointment of the Receiver contemplated the possession and control of *all* of the assets of the company, even to the extent of a dissolution of the company itself, if the financial requirements of the company could not be provided.

Brown Bonnell & Co. v. Lake Superior Iron Co.,
134 U. S., 530-6; 33 Law. Ed., 1021.

It cannot be reasonably denied, therefore, even if the allegations of the Baldwin petition were insufficient to warrant the appointment of a receiver under the statutory law of Ohio in that such relief was not ancillary to any other final relief for which prayer was made, that, nevertheless, the State court had at least jurisdiction of the subject-matter and the parties to the suit in the Baldwin case as well as the foreclosure suit, so as to constitute the decision of the United States Circuit Court of Appeals, for the Sixth Circuit, in the case at bar, a collateral attack upon the judgment of the State court in appointing a receiver in the Baldwin case and authorizing him to sue in the instant case.

And, again, these allegations of insolvency, etc., in the Baldwin petition, and the prayer for the appointment of a receiver upon this ground, were considered

by the State court as allegations and prayer for relief ancillary to the prayer for foreclosure in the Trustee's suit when the two cases were consolidated and the Receiver appointed in both of them.

The United States Circuit Court of Appeals for the Sixth Circuit, so far departed from the accepted and usual course of judicial proceedings as to call for an exercise of this Court's power of supervision in that—Second, it held that the authority of the State court to authorize the Receiver to sue Leach & Company could be questioned and attacked in this case.

The Circuit Court of Appeals, even had such an issue been made by the pleadings, had no jurisdiction to inquire into the power of the State court to authorize this suit, where, in a case such as this and where it is specifically admitted that the Receiver was *duly* and regularly appointed Receiver of *all* the assets of the Furnace Company, the raising of such a question in the instant suit constituted a collateral attack. The rule is, we believe, almost universal that such an issue can only be raised by direct attack in the proceedings appointing the Receiver.

In

> *Barbour v. National Exchange Bank,* 45 O. S., 133,

quoting from page 140 and 141 of the opinion,

> "It must be born in mind that here was an acting receiver. There was at least the form of a legal appointment, and that in a case which certainly invoked the discretion and considera-

tion of the court in the determination of the question whether an appointment could or ought to be made. This was jurisdiction. The Court acted. The appointment was made. The receiver proceeded to the discharge of the duties of the trust. This is not a direct proceeding to test the validity or regularity of the appointment. It is not a proceeding in error to review the order of appointment. It is a collateral inquiry. It is not enough that the court erred in its action. Unless it appear manifestly clear to us that the order of appointment was an absolute nullity by reason of the entire absence of jurisdiction in the court that made it, it cannot be assailed in this proceeding."

Now in the instant case, the regularity of the appointment of the Receiver over all the assets is admitted. See *Robertson v. Perkins, supra,* and Equity Rule Thirty. The decision of the Circuit Court of Appeals, therefore, constitutes a collateral attack; this question was not within its jurisdiction.

Egbert v. Building Assoc., 9 O. D., 646, Superior Court of Cincinnati (Syl. 4).

"Where a court has the power to appoint a receiver, which belongs to equity under certain circumstances, the exercise of that power, however erroneous, cannot be collaterally attacked."

In

Gunby v. Armstrong, 133 Fed., 417 (Syl. 3),

U. S. Cir. Court of Appeals, 5th Circuit:

"The regularity of the appointment of a Receiver by a court which had jurisdiction of the parties and the subject matter cannot be collaterally attacked."

Quoting further from the opinion on page 247, the Court says:

> "The rule has been clearly stated in the following language:
>
> 'The appointment of a receiver, by a court possessing general jurisdiction in law and equity, cannot be assailed collaterally, in any action or proceeding merely because such appointment was inequitable or erroneous; and so long as the jurisdiction, the inherent power—not the exercise of that power, but the power of the court itself to make it—is not questioned, the appointment is conclusive upon all parties until it is adjudged to be vacated in a direct proceeding instituted for that purpose by some party rightfully challenging it; and the presumption is that it was regularly made and that the court had jurisdiction to make it. If the decree was improvidently granted, or if for any reason it should be set aside or modified, relief can be had upon application by any party interested to the court by which it was made; but the regularity of the appointment of the receiver cannot be questioned by any other tribunal.' "

In

> *Collins v. Williamson,* 229 Fed., 59 (C. C. A., 6th, Cir.) (Syl. 2):
>
> "Under the rule that where a judicial tribunal has general jurisdiction of the subject-matter, and the special facts which give it the right to act in a particular case are averred, and not contraverted, upon notice to all the parties, jurisdiction is acquired, and cannot be assailed

in any collateral proceedings on a deed of general assignment made by a corporation under the Ohio statutes are not void because of the fact that the deed is filed and the proceedings are instituted in the insolvency or probate court of a county other than that in which the principal office of the company is fixed by its articles of incorporation, where the deed recites that the company is of the county in which the deed is filed, and no objection is made by any stockholder or creditor to the jurisdiction of the court, *which in such case can only be challenged by direct proceedings.*"

In

Lively v. Picton, 218 Fed., 401 (C. C. A., 6th Cir.) (Syl. 2):

"On a collateral attack upon the judgment of a court of competent jurisdiction, only jurisdictional defects can be considered."

Quoting from the opinion, on page 406,

"Turning, then, to the receivership proceedings in the Ohio court: the initial question thus is whether the Ohio court had jurisdiction to appoint a receiver; for as the order of that court is not directly, but only collaterally, attacked, the question of jurisdiction can alone be considered. That the order may have been erroneous, inequitable or ill-advised would not be enough to invalidate it here. Barbour *v.* Bank, 45 Ohio St., 133, 140, 141; 12 N. E., 5. Upon the general proposition that under collateral attack upon a judgment of a court of competent jurisdiction, only jurisdictional de-

fects can be considered; see Butterfield *v.* Miller (C. C. A., 6th Cir)., 195 Fed., 200, and cases cited at page 203, 115 C. C. A., 152."

This above quotation, we think, very clearly states the rule, and, *a fortiori,* does this apply when, as we have before shown, the jurisdiction of the court to appoint this Receiver was admitted by A. B. Leach & Company in their answer and amended answer in admitting all the averments of the first paragraph of the Receiver's petition. See Equity Rule 30 and the case of

Robertson v. Perkins, supra,

In

Butterfield v. Miller, 195 Fed., 200 (C. C. A., 6th Cir.) (Syl. 2):

"In a collateral attack on a judgment only jurisdictional questions can be considered, and, if the court was one of general jurisdiction, recitals of jurisdictional facts in its record are presumptively true, and can only be overcome by other evidence contained in the record."

See also the opinion on page 203.

Now all the jurisdictional questions are admitted in the instant case and no collateral attack can be made in it. The Circuit Court of Appeals was without jurisdiction to pass upon the precise point,—the only point on which it based its decision and reversed the decision of the district court.

In

Cincinnati Equipment Co. v. Degnan, 184 Fed., 834 (C. C. A., 6th Cir.) (Syl. 4):

"Where, in a creditor's suit against a corporation asking the appointment of a receiver, the defendant appeared and admitted the averments of the bill, which sufficiently alleged insolvency, and no collusion is charged, an intervener coming into the case after the appointment of a receiver cannot challenge the jurisdiction of the court to make such appointment."

(Syl. 5):

"Objection to jurisdiction in equity must be taken before the case has been entered upon on the merits, and an intervener who in his petition did not question the jurisdiction cannot do so after an answer has been filed to his petition and property has been surrendered to him under a stipulation."

Scott v. Farmers' Loan & Trust Co., 69 Fed., 17 (C. C. A., 8th Cir.):

We cite this case under this heading because it was cited by the Circuit Court of Appeals in its opinion and because this very case is in itself support of this Receiver in his contention that the Circuit Court erred. It will be noted that in this Scott case the one challenging the jurisdiction of the court did so by a direct proceeding by an intervention in the original case in which the receiver was appointed. Certainly, this case is no authority for a collateral attack upon the appointment of a receiver in a case like the instant

case where all the averments necessary to establish the jurisdiction of the State court are admitted and where no issue was made by the pleadings on that particular matter.

In:

Wagner Elec. Mfg. Co. v. Lindon, 282 Fed., 219 (C. C. A., 8th Cir.).

"While a national court may enjoin enforcement of a judgment of a state court, if inequitable, or for fraud practiced on the court or when the state court was without jurisdiction of the person, or the subject-matter, such relief cannot be granted, based on the fourteenth amendment, because the state court erred in its application of the law, *where its jurisdiction of the parties and subject matter were admitted,* especially where the state supreme court affirmed the judgment."

In:

Lydick v. Neville, 287 Fed., 479 (C. C. A., 8th Cir.).

(Syl. 1):

"Where a federal court had jurisdiction of the subject matter and the parties, its appointment of a receiver cannot be attacked collaterally on the ground that the allegations of the bill were not sufficient."

(Syl. 2):

"Where a writ of attachment from a state court had been levied on property of a corpora-

> tion, a federal court in which a suit was later commenced for appointment of a receiver for the corporation was without power to enjoin the state court from proceeding in the suit therein, or to interfere with its possession of the property."

Quoting from the opinion, page 482:

> "The state court having first obtained jurisdiction of the cause and possession of the property by the seizure under the writ of attachment the court below erred in interfering by injunction with this possession. This has been so frequently determined by the Supreme Court, as well as this and other national courts, that it is no longer an open question."

Citing many authorities, see page 483.

Now the allegations of the Receiver in the present case and the admissions of A. B. Leach & Company establish conclusively the jurisdiction of the court of the cause and of the possession of the property, and it was, therefore, gross error for the Circuit Court of Appeals to attempt to set up jurisdiction and under this assumed jurisdiction pass upon a point which was not at issue.

In:

> *Hartford Life Ins. Co. v. Johnson,* 268 Fed., 30 (C. C. A., 8th Cir.).

This case is an oft-cited case and contains numerous authorities. Quoting from syllabus 2:

> "Jurisdiction of the subject-matter of a suit depends on allegations, and not on facts, and

even if a court sustains its jurisdiction erroneously, when put in issue, its judgment is not subject to collateral attack, unless want of jurisdiction is shown on its face."

Quoting further, from the opinion on page 33:

"Jurisdiction of the subject-matter and of the parties is the right to hear and determine the suit or proceeding in favor of or against the respective parties to it. The facts essential to invoke this jurisdiction differ materially from those essential to constitute a good cause of action for the relief sought. A defective petition in bankruptcy, or an insufficient complaint at law, accompanied by proper service of process upon the defendants, gives jurisdiction to the court to determine the questions involved in the suit, although it may not contain averments which entitled the complainant to any relief; and it may be the duty of the court to determine either the question of its jurisdiction or the merits of the controversy against the petitioner or plaintiff. Facts indispensable to a favorable adjudication or decree include all those requisite to state a good cause of action, and they comprehend many that are not essential to the jurisdiction of the suit or proceeding."

Quoting further from page 34,

"It is true the jurisdictional allegations of a complaint may be put in issue by proper plea, but even in such a case the court in deciding such a plea exercises jurisdiction. Even if it sustains its jurisdiction erroneously, *the judg-*

ment is not subject to collateral attack, although cause for reversal upon appeal.''

In

Shields v. Coleman, 157 U. S., 168; 39 Law. Ed., 660 (Syl. 2).

"The circuit court of the United States, when property is in the possession of a receiver appointed by a state court, has no power to appoint another receiver and take the property out of the former's hands."

and on page 664,

"Undoubtedly the circuit court had authority under the bill filed June 6, 1892, to make the order appointing the receiver and taking possession of the property. Even if it were conceded that the bill was imperfect and that amendments were necessary to make it a bill complete in all respects, it would not follow that the court was without jurisdiction. The purpose of the bill—the relief sought—was, among other things, the possession of the property by a receiver to be appointed by the court, and when the court adjudged the bill sufficient, and made the appointment, that appointment could not be questioned by another court, or the possession of the receiver thus appointed be disturbed. The bill was clearly sufficient to uphold the action then taken."

Quoting further on page 664,

"But it is said that the receiver had no such interest in the property as will give him a standing in the circuit court to petition for the

restoration of the property to his possession, or to maintain an appeal to this Court from an order refusing to restore such possession. *This is a mistake.* He was the officer in possession by appointment of the state court, the proper one to maintain possession and to take all proper steps under the direction of the court to obtain the restoration of the possession wrongfully taken from him. It is a matter of every-day occurrence for a receiver to take legal proceedings, under the direction of the court appointing him, to acquire possession of property or for the collection of debts due to the estate of which he is receiver."

Quoting further on page 665,

"But, further, the question of right on the part of the petitioner antedates the final decree, and he stands in the Federal court backed by the order of the state court appointing him receiver, and directing him to press this application. If it were true that all the plaintiffs in the state court had abandoned their suit in that court, the remedy was *to call the attention of that court to the fact and have an order entered setting aside the appointment of a receiver, or directing the discontinuance of this application. We cannot, in this indirect way, pass judgment upon the action of that court.*"

In

Porter v. Sabin, 149 U. S., 473; 37 Law Ed., 815 (Syl. 6),

"A suit against a receiver appointed by a state court cannot be maintained, *nor the administration by that court of the estate in the*

receiver's hands be interfered with by a court of the United States, without permission of the state court, so long as the receivership exists."

Quoting further from page 818,

"The reasons are yet stronger for not allowing a suit against a receiver appointed by a state court to be maintained, or the administration by that court of the estate in the receiver's hands to be interfered with, by a court of the United States, *deriving its authority from another government, though exercising jurisdiction over the same territory.* The whole property of the corporation within the jurisdiction of the court which appointed the receiver, including all its rights of action, except so far as already lawfully disposed of under orlers of that court, remains in its custody, to be administered and distributed by it. *Until the administration of the estate has been completed and the receivership terminated, no court of the one government can by collateral suit assume to deal with rights of property or of action, constituting part of the estate within the exclusive jurisdiction and control of the courts of the other."*

Quoting further,

"The state court, upon further hearing or information, may hereafter reconsider its former orders, so far as no rights have lawfully vested under them, and may permit its receiver to sue or be sued upon any controverted claim. But should it prefer not to do so, the right of action of the corporation against its delinquent officers, like other property and rights of the cor-

poration, will remain within the exclusive jurisdiction of that court, so long as the receivership exists.''

In

Wiswall v. Sampson, 14 Howard, 323,

the syllabus reads as follows:

"Where real estate is in the custody of a receiver, appointed by a court of chancery, a sale of the property under an execution issued by virtue of a judgment at law, is illegal and void."

quoting from the opinion on page 328,

"When a receiver has been appointed, his possession is that of the court, and any attempt to disturb it, without the leave of the court first obtained, will be a contempt on the part of the person making it. This was held in *Angel v. Smith,* 9 Ves., 335, both with respect to receivers and sequestrators. *When, therefore, a party is prejudiced by having a receiver put in his way, the course has either been to give him leave to bring an ejectment, or to permit him to be examined pro interesse suo.* (1 J. & W., 176, *Brooks v. Greathed;* 3 Daniels Pr., 1984.) *And the doctrine that a receiver is not to be disturbed, extends even to cases in which he has been appointed expressly, without prejudice to the rights of persons having prior legal or equitable interests. And the individuals having such prior interests must, if they desire to avail themselves of them, apply to the court either for liberty to bring ejectment, or to be examined pro interesse suo; and this, though their right to the possession is clear.''*

In

Peale v. Phipps, 14 Howard, 459,

the syllabus reads as follows:

> "Two Statutes of Mississippi, one passed in 1843 and the other in 1846, provide that where the charter of a bank shall be declared forfeited, a trustee shall be appointed to take possession of its effects, and commissioners appointed to audit accounts against it.
>
> "Where these steps had been taken, and the commissioners had refused to allow a certain account, the Circuit Court of the United States had no right to entertain a bill filed by the creditors to compel the trustee to pay the rejected account. *There was a want of jurisdiction.*
>
> "The case is upon this point examined."

Quoting further from the opinion of Chief Justice Taney, on page 461:

> "We see no ground upon which the jurisdiction of the court can be sustained. The plaintiff in error held the assets of the Bank as the agent and receiver of the Court of Adams County, and subject to its order, and was not authorized to dispose of the assets, or to pay any debts due from the Bank, except by the order of the court. He had given a bond for the performance of this duty, and would be liable to an action, if he paid any claim without the authority of the court from which he received his appointment, and which he was accountable. The property, in legal contemplation, was in the custody of the court of which he was the officer, and had been placed there by the laws of Mississippi.

> And while it thus remained in the custody and possession of that court, awaiting its order and decision, no other court had a right to interfere with it, or to wrest it from the hands of its agent, and thereby put it out of his power to perform his duty."

If it shall be contended by our adversaries that the Circuit Court of Appeals did not ignor the unbroken line of authorities above cited precluding a collateral attack upon the judgments of the courts and shall refer the court to opinion of the Circuit Court of Appeals (R., 274) in which they have said:

> "We have had no occasion to consider whether the order appointing the receiver can be attacked in this case. The question is not whether that order is valid, but whether the receiver had authority, as he alleged, to bring this suit."

to that we make the very obvious reply that this case was brought pursuant to an order of the Ohio State court (R., 264) in which the Receiver

> "is authorized and directed to so commence the the action aforesaid against A. B. Leach & Company, Incorporated, in said court praying for such relief as should be obtained against said Company either for money judgment or otherwise, in order to reimburse the said Receiver for the apparent unlawful and illegal issuance of bonds by said Company to A. B. Leach & Company on or about May 15, 1922, in payment of * * * preferred stock."

Here then was the judgment of the court invoked by the Receiver and resulting in an order in a case in

which the court had full jurisdiction over all of the parties, the subject-matter and the Receiver. It involved the examination by the court of the probable merits of the case. It involved the question of how to conserve the funds or augment the funds distributable to the bondholders, creditors and stockholders of this corporation. It grew directly out of the issuance of the very bonds which were sought to be foreclosed secured by mortgage upon the assets of this corporation. It was as much a judgment and order of the court as the original appointment of the Receiver. If the original appointment could not be questioned or attacked collaterally, the court having full jurisdiction of the premises, how can any subsequent order or direction of the court involving an examination by the court of the facts be attacked in this collateral proceedings? The whole reasoning and logic preventing a collateral attack upon the judgment and orders of courts is based upon the theory of the integrity of the court's orders and judgments and for the sake of regularity and order of procedure forbidding the interference by other courts with the process of the State courts. The only procedure by which this order could be attacked would be by direct application to the court making this order.

The reasoning in some of the aforesaid cases cited in this brief supports our contention in this case. In addition thereto, we cite the court to the case of

Sanger v. Upton, 91 U. S., 56 (Syl. 1):

> "An order of court that the assignee in bankruptcy should proceed to collect a demand is con-

clusive as to the right of the assignee to bring suit thereon. The defendant in the suit cannot draw into question the validity of the order."

Upon the general proposition that orders of courts of competent jurisdiction are entitled to the same immunity from collateral attack as are final judgments, see

34 *C. J., Sec.* 816, pp. 515, 516.

Citing from the text but omitting extraneous matter as follows:

> "The rule against the collateral impeachment of judgment applied generally to all varieties of judgments, decrees or orders made by courts of competent jurisdiction, in all kinds of judicial proceedings * * *. The rule applies to orders or judgments * * * directing a receiver to pay claims, to levy an assessment *or to sue debtors.*"

Citing

Graves v. Denny, 84 S. E., 187.
Broch v. French, 116 Ill. A., 15.

The rule of immunity of judgments from collateral attack applies with equal force to orders of court.

Hogan v. Superior Court of California, 241 Pac., 584.

We think this rule applies in all its force in the Federal courts, and cite in support of that proposition

Voorhees et al. v. James Jackson, President of the Bank of the United States, 35 U. S. Supreme Court Reports, 448,

that part of the syllabus pertinent to this proposition is as follows:

> "There is no principle of law better settled than that every act of a court of competent jurisdiction shall be presumed to have been rightly done till the contrary appears. This rule applies as well to every judgment or decree rendered, in the various stages of their proceedings, from the initiation to their completion, as to their adjudication that the plaintiff has a right of action. Every matter adjudicated becomes a part of their record; which thenceforth proves itself, without referring to the evidence on which it has been adjudged."

See, also—

Tilton v. Cofield et al., 93 U. S. Supreme Court, 163.

Upon page 165 of the opinion by Justice Swayne, cites with approval and comments upon the case of

Voorhees v. Jackson, supra,

and proceeds in his opinion as follows:

> "There being no fraud, neither the judgment nor anything which preceded or followed it could be properly made the subject of review by that tribunal."

and to the same effect is the case of

Jarrell v. Cole, 215 Fed., 315 (C. C. A. 4th Cir.).

Conclusion to Point A.

In concluding this argument upon Point A, first and second, of this brief, may we point out the importance

of the case and the questions involved herein concerning which it is claimed by your petitioner that the lower court "so far departed from the accepted and usual course of judicial proceedings as to call for an exercise of this Court's supervision."

The case now involves, with interest, approximately $370,000—a large amount of money; in it is involved the question of the right of a Federal Court to, for all practical purposes, annul a judgment and order of a State Court of Ohio in a case in which the State Court had jurisdiction of the parties and the subject-matter; in it is also involved the question of the right of the lower court to depart from the accepted and usual course of judicial proceedings in suits by receivers as provided by the laws of the State of Ohio and the construction which courts of last resort of that State and the Federal Courts of the United States have placed upon those laws for many years.

In addition to all this, the injustice of the decision of the lower court is apparent and the case is important by reason of such injustice. If the Receiver finally recovers in this case, he will be bound to make distribution of the recovery under order of the State Court, to the parties entitled to it. The lower court, in its opinion (R., 273 & 4), stated:

> "This, of course, does not mean that those who suffered from fraud, if there was fraud, perpetrated upon the company in the issue and sale of the bonds, would be without remedy as, in that case, any injured precedent creditor or preferred stockholder could maintain an action for restitution."

We might add that the *bona fide* bondholders would also be entitled to restitution under these circumstances. It seems rather inconsistent, therefore, that your petitioner is not entitled to obtain such restitution for them, and also does it seem unjust and inequitable that this suit, so brought in their behalf, should be dismissed upon the pure technical ground that the State Court did not have authority to authorize your petitioner to maintain it on behalf of those whom the Receiver so represents.

POINT B.

The United States Circuit Court of Appeals for the Sixth Circuit, decided an important question of local law in a way in conflict with the applicable local decisions in that—First, it held that the State court appointing the Receiver did not have authority to authorize the bringing of this suit.

Under this heading, we again cite the case of

Cheney v. Maumee Cycle Co., 64 O. S., 205,

the first syllabus of which reads as follows:

> "An order appointing a receiver for an insolvent corporation which in terms makes him 'receiver for all the property and assets of the company, of every kind and description, wherever located,' is sufficiently broad to embrace the real estate of the corporation and is not invalid as respects such real estate because of the fact that the petition and motion in the case in which the order is made do not in terms refer to real estate, but, allegations otherwise

> being sufficient, prays 'that the court will appoint a receiver to take charge of all the property and assets of the company.' "

and we respectfully refer to the court's attention that portion of the opinion of the Supreme Court of Ohio as found in the last cited case on pages 214 and 215 to the effect that a receiver has a legal right in the property of which he is receiver and that the claims of creditors are thereby fastened upon it and the property held by the receiver as effectually as an assignee would have held it and that in no other way could the rights of the creditors be worked out. We also again cite the case of

> *W. D. Sayle, Receiver, v. The Guarantee S. & L. Co.*, 2 O. C. C. R. (N. S.), 401; affirmed by the Supreme Court of Ohio in 72 O. S., 639,

the first syllabus of which case reads as follows:

> "A receiver of an insolvent corporation may commence and maintain a suit to set aside a fraudulent transfer of securities and the recovery of possession thereof, and he may maintain such an action in his own name; all the authority in that behalf accorded to a receiver of a dissolved corporation is possessed by a receiver of an insolvent corporation."

and in this connection, we desire to quote also portions of the opinion of the Circuit Court in the last cited case, found on pages 405, 6 & 7, as follows:

> "It is well settled that one who conveys his property away for the purpose of defrauding his creditors, can not maintain an action to have

the property conveyed back to him, because, being guilty of a fraud in thus transferring his property, he must abide the consequences of such fraud. The executor or administrator is not a representative of the creditors of the decedent, but of the heirs and legatees, and they are entitled to no greater rights than the decedent himself. A receiver, however, is the representative of the creditors. The property is placed in his hands that it may be preserved and distributed to the creditors. The statute, as has already been said, provides for the bringing of such an action by the assignee, who is no more the representative of the creditors than is the receiver, yet the claim is not without force that since the one is named in the statute and the other is not, that the statute meant to make a distinction between them as to the right to bring a suit. No good reason seems to exist why the reperesentative of the creditors, by whatever name he is designated, should not have the right to bring such suit as the cerditor himself might bring.

In the case of *Monitor Furnace Co. et al. v. Isaac Peters et al.*, 40 O. S., 575, it is held that it is the duty of a receiver who was appointed for a dissolved and insolvent corporation to bring suit to set aside conveyances fraudulently made. The language used by Judge Nash in the opinion, on page 583, is:

" 'It is the right and duty of the receiver of a dissolved and insolvent corporation to pursue after and recover property which has been fraudulently conveyed before the dissolution.'

"To the same effect is the case of *The Smead Foundry Co. v. Chesbrough*, 16 Cir. Ct. Reports, 783,

"It is urged, however, that these cases differ from the one at bar in that the receiver in each of these cases was for a dissolved corporation appointed under R. S. Section 5587, and that his powers are found in R. S. Section 5590. Section 5587, paragraph 5, provides in what cases receivers may be appointed, in the following language:

" 'In the cases provided in this title, and by special statutes, when a corporation has been dissolved, or is insolvent, or in imminent danger of insolvency, or has forfeited its corporate rights.'

"And Section 5590 provides:

" 'The receiver shall have power, under the control of the court, to bring and defend actions in his own name, as receiver, to take and keep possession of the property, to receive rents, collect, compound for and compromise demands, make transfers, and generally to do such acts respecting the property as the court may authorize.'

"Paragraph 6 of Section 5587 provides for the appointment of receivers in all other cases where receivers have heretofore been appointed by the usages of equity.

"The receiver in *this* case was appointed for an insolvent corporation. By the usages of equity receivers have been so appointed time out of mind, so that it would seem that whatever actions a receiver appointed for a dissolved corporation might bring *this* receiver might bring.

"*In Whittlesey v. Delany*, 73 N. Y., 571, the first paragraph of the syllabus reads:

" 'An action to set aside and vacate a judgment against a corporation on the ground that

it was obtained without consideration, by collusion with the officers of the corporation, and in fraud of cerditors, may properly be brought in the name of and by a receiver of the corporation.'

"In Section 72 of Smith on Receiverships, this language is used:

" 'The power of the receiver to sue in his own name has been recognized however where the order of court so directs, or the statute so authorizes. But in the absence of such power he must sue in the name of the person or corporation over whose property he is appointed. * * *

" 'Where a court of chancery in the order of appointment confers power on the receiver to sue, he may do so on the principle that the receiver is, by operation of law, subrogated to all the rights of the real party in interest.'

"We are aware that many cases are reported which hold that a receiver in a case like this can not maintain the action in his own name. We hold, however, that this action can be so maintained. We see no reason why a receiver appointed for a dissolved corporation may under our statutes bring such action unless the receiver of an insolvent corporation may also maintain the action."

The lower court, in commenting upon the last cited case, stated (R., 274):

"Nor do we overlook *Sayle, Recr. v. The The Guarantee Savings & Loan Company* * * * That case is to be considered, we think, in the light of the further rule in Ohio that a court has no authority to appoint a re-

> ceiver, and therefore no power to confer, except in aid of the objects of a pending cause. When so considered, the decision in the circuit court and its affirmance without opinion in the supreme court can not be regarded as establishing a settled construction by the highest court of the State. The affirmance by the supreme court may have been upon some other ground than on which the action of the circuit court was based."

The question decided by the Circuit Court of Cuyahoga County in this last cited case was as to the right of a receiver to sue, and the court determined that a receiver of an insolvent corporation has the same authority in that regard as the receiver in a dissolved corporation. The Supreme Court of Ohio affirmed this judgment without report. We cannot see, therefore, the pertinence of the statement of the lower court when its opinion states that "the affirmance by the Supreme Court may have been upon some other ground than that on which the action of the circuit court was based." In Ohio, since 1857, the syllabi of the reported case is the law established thereby and the first syllabus of the Sayle case, *supra*, holds our contention in this case to be the law of the State of Ohio.

We further cite to the court under this heading the case of

Barbour v. National Exchange Bank, 45 O. S., 134, and quote from the second syllabus thereof as follows:

> "For the purpose of recovering back interest, paid by such corporation to a national bank, under section 5198, Rev. Stats. of U. S., providing for such recovery by "the person to whom it has been paid, or his legal representative," a receiver is a "legal representative" of such corporation, and authorized to prosecute an action for such recovery. *National Bank v. Trimble,* 40 Ohio St., 629, approved and followed."

We believe that the above-quoted rule of construction of the statutes of Ohio as to the powers of a receiver pretty clearly indicates that the Supreme Court of Ohio has at all times been wholly in accord with the rule laid down by the Circuit Court of Cuyahoga County, Ohio, in the Sayle case, *supra,* when the Ohio Supreme Court affirmed the decision of the Circuit Court in that case.

The courts of Ohio having determined that the rights and powers of a receiver of an insolvent corporation are the same as an assignee in insolvency proceedings would have, we look to the rule of law in Ohio as applicable to the rights and powers of such assignees, and cite in connection therewith the case of

Cornell v. Sulter, 13 O. C. D., 384,

the syllabus of which is as follows:

> "The assignee in insolvency proceedings is the proper party to prosecute an action to set aside a fraudulent transfer of property, or to have determined the rights of persons claiming liens on any of the assigned property by pledge or otherwise, and the priority thereof."

Also we quote the syllabus in the case of

Monitor Furnace Co. v. Isaac Peters et al., 40 O. S., 575,

as follows:

> "In March, 1876, the Monitor Furnace Company, a corporation, was dissolved by a decree of the court of common pleas of Lawrence county, and J. P. S. was appointed and qualified as receiver, to administer the estate under the direction of the court, for the benefit of creditors and stockholders. Before that time the furnace company made a sale of its real estate and other property for the alleged purpose of defrauding its creditors. In August, 1878, the receiver having taken no steps to have the sale declared void, L. B., a judgment creditor, commenced an action for that purpose in the same court that dissolved the corporation and appointed a receiver. The corporation and its stockholders, the receiver, the creditors and all persons interested were made parties defendant.—*Held:* That this action was substantially an application to the court to direct the receiver appointed by it to do his duty in the case stated."

We submit, therefore, that the decision of the lower court as to the authority of the Receiver in the instant case to maintain this suit is in conflict with applicable local decisions.

The United States Circuit Court of Appeals for the Sixth Circuit decided an important question of local law in a way in conflict with the applicable local de-

cisions in that—second, it held that the authority of the State court to authorize the Receiver to sue Leach & Company could be questioned and attacked in this case.

Under this heading, we again refer to the Court's attention the case of

Barbour v. National Exchange Bank, 45 O. S., 133,

the opinion of the Supreme Court of Ohio in this case clearly indicating the rule adopted in local decisions as to the question of collateral attack, quotations from which opinion are heretofore found on page ~~38~~ 40 of this brief.

To the effect that the judgment of the lower court in the instant case was a collateral attack upon the judgment of the State Court, we further cite the second syllabus of a case decided by the lower court in

Collins v. Williamson, 229 Fed., 59,

which is fully quoted on page ~~40~~ 43 of this brief. And we also cite another decision of the lower court to the same effect, to-wit, the case of

Lively v. Picton, 218 Fed., 401,

the second syllabus and portions of the opinion of which are quoted on page ~~40~~ 44 of this brief, and the further cases decided by the same court and upon the same question, of

Butterfield v. Miller, 195 Fed., 200,

the second syllabus of which is quoted on page 42 of this brief. Also the case of

Cincinnati Equipment Co. v. Degnan, 184 Fed., 834,

the fourth syllabus of which case is quoted on page 46 of this brief. For the citations of the authority of the Supreme Court of Ohio to the effect that the judgment of a court cannot be collaterally attacked, we cite the following:

Hart v. Menahan, 70 O. S., 201;
Children's Home v. Fetter, 90 O. S., 110;
Paulin v. Sparrow, 91 O. S., 279.

POINT C.

The United States Circuit Court of Appeals for the Sixth Circuit decided an important question of general law in a way untenable or in conflict with the weight of authority.

We believe, your Honors, that all we have said under Point A, First and Second, may be properly argued under this heading. The laws of the several states of the Union seem to us to be fairly uniform, and, while we have not encumbered this brief with citations of many decisions of courts of last resort of states of the United States other than Ohio, we have cited and quoted from decisions of the Federal Courts of the United States construing the laws of those other states, and believe that these authorities and those of Ohio as well as the logic and reason of them, are such

as to clearly indicate that the decision of the lower court in the instant case, both as to the authority of the Receiver and the attack upon the judgment of the State court in authorizing the instant case, *is untenable and in conflict with the great weight of authority.*

POINT D.

The United States Circuit Court of Appeals for the Sixth Circuit rendered a decision in conflict with the decisions of other United States circuit courts of appeals on the same matter in that—First, it held that the State court appointing the Receiver did not have authority to authorize the bringing of this suit.

We cite under this heading the case of

Mississippi Valley Trust Co. v. Railway S. S. Co. et. al., 258 Fed. (8th C. C. A.), 346,

the *seventh* syllabus of which is found on page 37 of this brief, and respectfully call your Honor's attention to that part of the opinion as found upon page 355 of the case as announcing a line of reasoning wholly applicable to the case at bar.

The United States Circuit Court of Appeals for the Sixth Circuit rendered a decision in conflict with the decisions of other United States circuit courts of appeals on the same matter in that—Second, it held that the authority of the State court to sue Leach & Company could be questioned and attacked in this case.

We cite under this heading the case of

Taylor v. Easton, 180 Fed. (8th Cir.), 363,

holding as follows:

> "5. A Circuit Court of the United States, in the absence of statute requiring notice of application for the appointment of a receiver, in the exercise of judicial discretion, may oppoint a receiver without notice; such appointment being subject only to direct attack for abuse of discretion."

We also cite the case of

Lydick v. Neville, 287 Fed. (8th Cir.), 479,

quotations from which are found on page ~~42~~ 47 & 48 of this brief.

We also cite to the court under this subject heading the case of

Wagner Elec. Mfg. Co. v. Lindon, 282 Fed., 219 (8th Cir.),

and particularly the quotations therefrom as found on pages ~~42 and 43~~ 47 of this brief. Again we cite under this heading the case of

Hartford Life Ins. Co. v. Johnson, 268 Fed., 30 (8th Cir.).

Quotations pertinent to this subject-matter are found on pages ~~43 and 44~~ 48 of this brief.

And as further indicating the conflict of a decision of a Circuit Court of Appeals other than those which

are cited above, we cite the decision of the United States Circuit Court of Appeals, for the Fifth Circuit, as found in the case of

Gunby v. Armstrong, 133 Fed., 417,

the third syllabus of which reads as follows:

> "The regularity of the appointment of a receiver by a court which had jurisdiction of the parties and the subject-matter can not be collaterally attacked."

and again and to the same effect, is the case of

Jarrell v. Cole, 215 Fed., 315 (C. C. A. 4th Cir.).

Conclusion of Brief.

We have thus argued our reasons for the granting of the petition for a writ of certiorari in this case upon four of the grounds suggested by this Court in Rule 35, Sec. 5, and feel that we have cited and quoted from an abundance of authorities to substantiate the points we have made upon them.

In addition to this, the case at bar is one involving the law of and the practice and procedure in suits commenced in the State of Ohio. The facts that the Hon. District Court originally decided this case for your petitioner and that the Hon. District Court Judge who sat upon the United States Circuit Court of Appeals, for the Sixth Circuit, dissented from the opinion of the United States Circuit Court of Appeals (both of these judges being Ohio lawyers) may or may not be of such importance as to indicate error in the decision of the latter Court upon the questions now

before this Court for determination, but we seriously urge here that the learned opposing counsel at the time the issues were made by the pleadings in the District Court had no thought in mind whatever but that the Receiver had full authority to commence and maintain this action. The records of the Receiver's appointment and the order to sue herein were at all times available to them, and it is fair to assume that they were fully cognizant of what the records contained; yet they admitted the due and lawful appointment of the Receiver and failed to deny his authority to sue.

Justice will not have been done, in our opinion, if this petitioner is not finally held by this Court, or the lower court, entitled to a recovery. The only grounds upon which the lower Court determined that the Receiver is not entitled to such recovery are so extremely technical and, we might add, so far beyond the average lawyer's or layman's idea of the fair administration of justice, as to call for a complete and final determination by this, the highest Court of the land.

It is, therefore, respectfully submitted that this case is one calling for the exercise by this Court of its supervisory powers in order that the final decision in the case may be in accord with the law of the land and the decisions of other circuit courts of appeals upon the same matter, that the final decision in this case may be in conformity with applicable local decisions upon the important questions of local law involved herein, that the final decision in this case upon

important questions of general law may be tenable and in accord with the weight of authority, that the final decision herein may also be in accord with the accepted and usual course of judicial proceedings, and that fair and equitable justice may be done, and that to such an end a writ of certiorari should be granted and this Court should reverse the decision of the United States Circuit Court of Appeals, for the Sixth Circuit, and finally reverse and render final judgment for your petitioner.

Respectfully submitted,

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